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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 230

SAMUEL H. MOSS, INC.,

Petitioner,

vs.

FEDERAL TRADE COMMISSION

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

HENRY WARD BEEB,
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Samuel H. Moss, Inc., prays that a writ of certiorari be issued to review a decree of the Circuit Court of Appeals for the Second Circuit, entered in this cause on April 17, 1945, which affirmed an order of the Federal Trade Commission requiring it to cease and desist from discriminating in price between purchasers of made-to-order rubber stamps.

Opinion Below

The opinion of the Circuit Court of Appeals (R. 424-427) is reported in 148 F. (2d) 378.

Jurisdiction

The decree of the Circuit Court of Appeals was entered and filed on April 17, 1945 (R. 429-430). The jurisdiction of this Court is invoked under Section 11 of the Clayton

Act, 32 Stat. 734, 15 U. S. C. 21, and Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented

1. Whether Sections 2 (a) and 2 (b) of the Clayton Act impose upon a person, accused of unlawful price discrimination, the burden of proving that the effect of the discrimination may not be substantially to lessen competition or may not be to tend to create a monopoly or may not be to injure, destroy or prevent competition with a competitor, upon the mere proof by the Federal Trade Commission that the accused sold a commodity at different prices to different customers.

2. Whether injury to competition within the meaning of Section 2 (a) of the Clayton Act is made out merely by proof that, in a highly competitive business, a competitor lost a particular sale to a customer who was quoted a lower price by a person trying to get the sale and not trying to drive the competitor out of business.

3. Whether a merchant who sells his wares to different customers in different parts of the United States at different prices is guilty per se of unlawful price discrimination under Section 2 (a) and Section 2 (b) of the Clayton Act.

4. Whether Congress intended by Section 2 (a) and Section 2 (b) of the Clayton Act to make it unlawful, where a buyer solicits sealed competitive bids, for a merchant to sell his wares to that buyer at his bid price if it is lower than the prices he obtained in prior or other sales, unless the lower price did not actually undercut the competitors' bid prices.

5. Whether a defense of meeting competition under Section 2 (b) of the Clayton Act is not made by proof that the lower prices were made in order to meet anticipated com-

petition of aggressive competitors, or that the lower prices were based on the verbal statements of buyers that competitors were offering to sell at equally low or lower prices.

6. Whether the Federal Trade Commission did not commit reversible error in refusing to allow petitioner to make out its defense that its lower prices were made in good faith to meet equally low prices of competitors.

7. Whether petitioner was denied a fair and impartial hearing in violation of its constitutional rights because of the Federal Trade Commission's refusal to permit it to prove that certain competitors who were formerly its employees were underselling it in a manner that caused petitioner, in good faith, to meet their equally low prices.

8. Whether a statute can be constitutional if it is interpreted to mean that in the absence of a requirement of proof of an unreasonable restraint of trade, either by a substantial lessening of competition or a tendency to create a monopoly, a seller can be forced to sell to his customers at the same prices or can be forced only to meet his competitor's price and not attempt to beat it, or can be forced to continue to observe the first price he fixes for his merchandise, or can be forced to find out his competitor's price before fixing his own price.

Statute Involved

Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, Act of June 19, 1936, 49 Stat. 1526, 15 U. S. C. 13, provides in part:

> SEC. 2. (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the pur-

chases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however*, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales

under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

Statement

Samuel H. Moss, Inc., petitioner herein, is engaged in the highly competitive business of manufacturing and selling commercial marking devices known as rubber stamps.* As such it is in competition throughout the United States with hundreds, if not thousands, of other manufacturers of rubber stamps. In New York City, where petitioner has its place of business, it has no less than thirty-two competitors (R. 45-47). Anyone with a vulcanizer, a drill and a saw can engage in the business of making and selling rubber stamps (R. 206).

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* Rubber stamps are of two types: "made-to-order" stamps and "ready-made" or "stock" stamps. The "made-to-order" stamps are made in accordance with the customer's special copy, while the "stock" stamps contained commonplace, often-used words, such as "Paid", "Rush", "Received", "Answered", etc. The complaint herein (R. 2-7), the stipulation (R. 12-16) and the findings as to the facts (R. 17-29), refer only to the "made-to-order" rubber stamps, but the order to cease and desist (R. 30-32) is by its language applicable to rubber stamps generally.

The Federal Trade Commission brought this proceeding pursuant to Section 11 of the Clayton Act, charging the Moss Company with violating Section 2 of that Act as amended by the Robinson-Patman Act, in that in the course and conduct of its business it had unlawfully discriminated in price between different purchasers of made-to-order rubber stamps of like grade and quality.

The Commission, aided by a stipulation, proved that in the highly competitive rubber stamp industry, petitioner sold made-to-order rubber stamps to eight particular customers at lower prices than it was selling the same stamps to other customers. Some of these sales were secured by petitioner on the basis of sealed bids in competition with other stamp manufacturers (R. 164, 337-338); and in some of these sales, as well, petitioner's lower prices were the result of statements by the customers that its competitors were offering to sell to them for less (R. 343, 384-385). The eight instances were, nevertheless, incorporated in its findings, on the basis of which the Commission ordered petitioner to cease and desist from discriminating among different purchasers in alleged violation of Section 2 (a) of the Clayton Act (R. 30-32).

On petition to review, the Circuit Court of Appeals for the Second Circuit affirmed the order of the Commission on the specific grounds that the Commission, having proved that petitioner had, in the eight instances, sold made-to-order rubber stamps to eight particular customers at lower prices than it was selling similar stamps to other customers, the order was warranted because "*petitioner* did not prove *affirmatively* that the discrimination did *not* lessen competition or tend to prevent it; nor did it prove that its lower prices were only 'to meet an equally low price of a competitor.' On the contrary, it did not know its competitors' prices, but merely 'bid low enough to get the business.'" (R. 425).

In justifying its conclusion that the statute imposed such a drastic, impossible, affirmative burden on the accused, the court below also said:

> "It is true that § 2 (a) makes price discrimination unlawful only in case it lessens, or tends to prevent, competition with the merchant who engages in the practice; and that no doubt means that the lower price must prevent, or tend to prevent, competitors from taking business away from the merchant which they might have got, had the merchant not lowered his price below what he was charging elsewhere. But that is often hard to prove; the accuser must show that there were competitors whom the higher of the two prices would, or might, not have defeated, but who could not meet the lower. Hence Congress adopted the common device in such cases of shifting the burden of proof to anyone who sets two prices, and who probably knows why he has done so, and what has been the result. If he can prove that the lower price did not prevent or tend to prevent anyone from taking away the business; he will succeed, for the accuser will not then have brought him within the statute at all" (R. 425).

Insofar as the defense of meeting competition is concerned, the Court disregarded proof that the petitioner's lower prices were quoted: (1) in an attempt to meet anticipated competition, and (2) as a consequence of statements by buyers that competitors were selling at equally low prices; and also disregarded the fact that the prices were in some of the instances incorporated in sealed competitive bids. It held, in effect, that such excuses for the lower prices were insufficient but that the accused must prove affirmatively that he did "not undercut his competitor's price."

Another point considered by the Circuit Court of Appeals (R. 426-427) was whether the Commission had committed reversible error by reason of the fact that its trial

examiner had refused (R. 297-299) to permit petitioner to question the owner of a competing company and others, as to whether that company and others had competed with petitioner for the business of each of the eight customers cited by the Commission in its findings. Having throttled petitioner at the very threshold of this crucial testimony, it was argued to the Circuit Court of Appeals that the Commission had made it impossible for petitioner to prove that its lower prices were fixed to meet the equally low prices of competitors.

It was also contended below that the statute commanded the Commission to allow this defense to be proved by providing in Section 2 (b):

> "That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price * * * was made in good faith to meet an equally low price of a competitor. * * * "

Petitioner's counsel, who tried the case before the Commission, made it evident in his offer of proof that he expected to show petitioner's former employees were underselling it, that is as he said soliciting "our customers at prices they knew they could get it for" (R. 295). Moreover, these customers were the very customers referred to in the stipulation and the Commission's findings.

The Circuit Court of Appeals, while criticizing the Commission for its "strictness" in refusing to admit the evidence offered, rejected petitioner's contention on the ground that its attorney did not make it clear in his offer of proof that the witnesses would testify that petitioner's offers were no lower than its competitors. Yet the offer of proof demonstrates the fact that had the trial examiner permitted the question to be asked and answered, the required evidence would have been elicited.

Specifications of Errors to Be Urged

The Circuit Court of Appeals erred:

(1) In construing Section 2 (b) of the Clayton Act as putting upon the respondent before the Commission the burden of proving affirmatively that the effect of sales to certain purchasers at lower prices might *not* be substantially to lessen competition, or might *not* be to tend to create a monopoly in any line of commerce, or might *not* be to injure, destroy or prevent competition with it.

(2) In construing Section 2 (b) of the Clayton Act as shifting to the person "who sets two prices" the burden of proving that the lower price "did not prevent or tend to prevent anyone from taking away the business."

(3) In holding that the effect on competition, required to be proved under Section 2 (a) of the Clayton Act as an integral part of unlawful price discrimination, is a "justification" which must be affirmatively shown by the respondent under Section 2 (b) of the Act.

(4) In holding that a "*prima facie*" case under Section 2 (b) of the Clayton Act is made out by proof that a respondent "sold rubber stamps to some of its customers at lower prices than it was selling the same stamps to other customers."

(5) In holding that the defense of meeting competition under Section 2 (b) of the Clayton Act cannot be made out unless respondent can show that he actually "did not undercut his competitors" and that it is insufficient that respondent's lower prices were set to meet anticipated competition or were fixed in response to buyers' statements as to what competitors were quoting.

(6) In failing to hold that under Section 2 (a) of the Clayton Act, it is not enough for the Commission to prove mere discrimination in price but that the Commission must also prove that the discrimination had the unlawful effects defined in that section.

(7) In failing to hold that where prices are submitted in the form of sealed bids in competition with other manufacturers, there can be no violation of Section 2 (a) of the Clayton Act, and that in such case the defense of meeting competition under Section 2 (b) of the Clayton Act has been made out.

(8) In failing to hold that the Commission committed grievous and reversible error and did not accord to petitioner a full, fair and impartial hearing in refusing to permit petitioner to introduce evidence that its competitors solicited the business of the eight customers set forth in the Commission's findings and that its lower prices to these customers were fixed in order to meet equally low prices of competitors.

(9) In holding that petitioner's attorney who tried the case did not offer to prove "that the offers which it made were in fact no lower than that of its competitors" when the attorney explicitly declared that he wanted to show that competitors solicited its "customers at prices they knew they could get it for" (R. 295); i.e. by undercutting petitioner, for otherwise they could not get the customers away from it.

(10) In failing to hold Section 2 (a) and Section 2 (b) unconstitutional and void if construed to apply to the instant case.

(11) In affirming the Federal Trade Commission's order to cease and desist.

Reasons for Granting the Writ

1. This case presents a serious question as to the meaning of Section 2 (b) of the Clayton Act, which is of vital importance to all merchants in the United States and which has not been, but should be, settled by this Court.

The Circuit Court of Appeals for the Second Circuit has held that upon mere proof by the Federal Trade Commission that a respondent has sold to two customers at different prices, the respondent has the burden of affirmatively proving "that the lower price did not prevent or tend to prevent anyone from taking away the business" and "did not lessen competition." Such an interpretation misreads Section 2 (b). To impose upon the accused the burden of disproving one of the essential ingredients of the substantive offense with which he is charged—a conception so directly contrary to our fundamental principles of justice—requires the most positive and direct language on the part of Congress.

Reading Section 2 (a) and Section 2 (b) together, as they must be, since the latter merely prescribes certain procedure in proving before the Commission the offense described in Section 2 (a), it is evident that Congress intended no such deprivation of fundamental rights as the Circuit Court of Appeals' decision ascribed to the legislative branch.

Section 2 (b) imposes upon a respondent the burden of proving affirmatively one of the several justifications by which discriminations, even though they substantially lessen competition, tend to create a monopoly or injure, destroy or prevent competition with the discriminator, may yet be excused. These justifications to which Section 2 (b) alludes are in the nature of pleas in "confession and avoidance" and refer to the meeting of a competitor's price as set forth in Section 2 (b) and to the content of the provisos in Section 2 (a), as, for example, where lower prices are

due to "price changes in response to changing conditions affecting the market for or marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescense of seasonal goods, distress sales under court process or sales in good faith. in discontinuance of business in the goods concerned."

The word "justification" in Section 2 (b) does not refer to the effect on competition which is an integral part of the substantive offense of unlawful price discrimination under Section 2 (a). For without one of the prescribed adverse effects on competition, there just is no offense.

Section 2 (b) cannot be read as a statute complete in itself. A *prima facie* case cannot be made out without proof that the sales in question, or at least one of them, was in interstate commerce. Yet Section 2 (b) nowhere refers to this jurisdictional prerequisite; it is found in Section 2(a) as is the effect on competition. Just as the Commission and not the respondent must prove affirmatively that interstate commerce is involved, so must the Commission prove affirmatively that the effect of respondent's lower price might be substantially to lessen competition or tend to create a monopoly or injure, destroy or prevent competition with a competitor.

The decision of the Circuit Court of Appeals in placing upon the accused merchant the burden of proving "affirmatively that the discrimination did not lessen competition or tend to prevent it" has created an obstacle that in the ordinary course of trade is impossible for him to overcome. The Court erroneously assumes that the merchant knows or can find out the competing prices of all of his competitors as well as the effect of his lower price on the ability of each of his competitors to compete. Competition, the life blood of trade, does not take place under glass. It is still a struggle of the contending forces and Congress did

not intend to impose a different economy on American business through the enactment of the Robinson-Patman Act. Nor did Congress intend that a merchant who sells his goods at different prices in the daily battle for business was guilty of unlawful price discrimination.

Inasmuch as a merchant will rarely be in a position to overcome the burden that is not rightly his, the Circuit Court has used Section 2(b), a procedural device, to modify the substantive offense created in Section 2(a). By its decision the lower court has therefore, in effect, made every merchant who sells his wares at different prices guilty, *per se*, of unlawful price discrimination. Such a decision is of the greatest concern to every American merchant and the question involved is so serious that it should be settled by this court.

2. The decision below may seriously hinder the future administration of the Clayton Act and is, moreover, in conflict with decisions of other Circuits and of this Court.

The so-called anti-price discrimination section of the Clayton Act (Section 2 (a)) has been invoked by the Federal Trade Commission in over one hundred instances since its amendment by the Robinson-Patman Act on June 19, 1936. The complaints cover every conceivable industry in every part of the United States. Section 2 (b) which prescribes the Commission's procedure in proving the complaints is consequently of tremendous importance in the administration of the statute. American business has a great stake in a workable construction of the statute.

There have been very few decisions by the courts regarding Section 2 (b). Yet because of the importance of this section, it is the very paucity of its judicial treatment which makes the decision below loom so large in the administration of the law and makes its review by this Court so imperative.

In not one of the previous rulings involving Sections 2 (a) and 2 (b) either in the Seventh Circuit, in the cases of *Corn Products Refining Co.* v. *Federal Trade Commission,* 144 F. (2d) 211, *Federal Trade Commission* v. *A. E. Staley Manufacturing Co.,* 135 F. (2d) 453, 144 F. (2d) 221, or in the Sixth Circuit in the case of *E. B. Muller & Son, Inc., et al.* v. *Federal Trade Commission,* 142 F. (2d) 511, or in this Court's opinions in the *Corn Products* and *Staley* cases, 324 U. S. —— and ——, decided April 23, 1945, was Section 2 (b) interpreted as by the Second Circuit Court below to require the respondent to prove affirmatively that his lower price "did not prevent or tend to prevent anyone from taking away the business" and "did not lessen competition or tend to prevent it."

In each of the foregoing cases the courts by their analyses of the proof made it evident that they regard the burden of proof in this important respect as being upon the Federal Trade Commission.

As a matter of fact, in the first decision in the *Staley* case, 135 F. (2d) 453,* the Seventh Circuit said specifically that it was not enough for the Commission to prove mere discrimination in price but that the Commission must also prove that this lessened competition. The lower court here admitted that it did not agree with the Seventh Circuit and said:

> "We are not sure that our interpretation accords with the rulings of the Seventh Circuit in *A. E. Staley Manufacturing Co.* v. *Federal Trade Commission,* 135 Fed. (2) 453; S. C. 144 Fed. (2) 221. In the first of these the court said (p. 455) that it was not enough to prove mere discrimination in price, but that the Commission must also prove that this lessened com-

* This first decision was not involved in the Supreme Court's determination, 324 U. S. ——. It was the second decision, 144 F. (2d) 221, which followed a remand to the Commission that was reviewed by this Court.

petition; and for this it relied upon *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, decided before the amendment of 1936. Indeed, the decision appears actually to have turned upon the Commission's failure affirmatively to prove that the discrimination had lessened competition. To that we cannot agree for the reasons we have given." (R. 426.)

In the second opinion in the *Staley* case, 144 F. (2d) 221, the Seventh Circuit said "that the discriminations were such as may be substantially to lessen competition or tend to create a monopoly" and that "It is clear, therefore, that a *prima facie* case of unlawful price discrimination was made out."

The Supreme Court's decision, reversing the *Staley* case, 324 U. S. ——, in no way affected this reasoning, for in fact this Court also demonstrated that the "*prima facie*" case referred to in Section 2 (b) consists of more than proof of sales at different prices. It first held that the discriminations there involved were unlawful because they had "the defined effect upon competition" and only then considered whether the respondent had rebutted "the Commission's '*prima facie*' case."

The lower court has declared, however, that the Commission can make out a *prima facie* case merely by proof of sales at different prices; that thereupon there is shifted to the respondent the burden of proving that the price discrimination did not lessen or tend to "prevent competition with the merchant who engages in the practice."

Should the Commission follow the opinion of the Court below, its administration of the Clayton Act would be contrary to its own convictions. The Commission has never considered its burden under Section 2 (b) fulfilled by mere proof of sales at different prices. *Its argument to the court was not that respondent had failed to prove affirmatively that the discriminations did not lessen competition*

but that it, the Commission, had proved that the discriminations "injured competition."

The Second Circuit's decision is thus contrary to every other decided case and contrary to the Commission's present practice in administering the Clayton Act. Furthermore, it is a decision that is fraught with dangers to every American merchant since he must be prepared to prove himself *not guilty* of unlawful price discrimination, when accused by the Commission. This Court's review of the decision below is of the greatest public importance.

3. This case also presents a question as to the meaning of Section 2 (a) of the Clayton Act which is of general and serious importance and which has not been, but should be, settled by this Court.

The statutory requirement that the effect of the lower price must be of such a nature as to injure, destroy or prevent competition with the person granting the discrimination, has been held by the Circuit Court to be satisfied by a competitor's loss of a particular sale.

Petitioner submits, firstly, that the statutory requirement must include the word "substantially" with which the entire clause dealing with the effect on competition is prefixed. In the interest not only of grammar but of justice, this is necessary. Otherwise the loss of one sale in an insignificant amount would be sufficient. The diversion of trade must rise to a degree which affects the public before it can be considered as having an adverse effect on competition.

As was held in this Court's opinion in the *Corn Products* case, 324 U. S. —, it is not the mere possibility of lessening competition at which the statute is aimed, but it was intended "to reach those which would probably have the defined effect on competition." There can be no such probability in the instant case.

In the next place, the statute refers to injury to *competition,* not to injury to a competitor. In a highly competitive industry such as the rubber stamp industry, where a competitor loses and gains orders as a common practice, it can hardly be said that the loss of a single sale constitutes an injury to *competition.* On the contrary, a loss of a sale to a competitor who quotes a lower price, actually *fosters,* rather than injures, competition.

4. This case also involves the important question of whether the defense of meeting a competitor's price, referred to in Section 2 (b), is made out: (1) by proof that the customer was quoted by sealed bids, and (2) that the lower prices were (a) in response to information from the buyers that competitors were quoting equally low or lower prices, and (b) in anticipation of possible competition from aggressive competitors. Disregarding these questions so vital to American business, the Court below held that the defense of meeting a competitor's price can only be made out by proof that the accused has not undercut his competitor. *Such a ruling would make it necessary for a merchant to know his competitor's price before he could quote a lower price, and would put the merchant on the horns of a dilemma, for if he unknowingly undercuts his competitor's price, he violates Section 2 (a) of the Robinson-Patman Act and if by an arrangement he finds out his competitor's price and lowers his price only to meet it, he may be violating the Sherman Act, a criminal statute.* Congress did not intend that a merchant should be placed in such a precarious position.

5. The Circuit Court's decision sustaining the action of the Commission's trial examiner in excluding vital testimony offered to prove that petitioner's lower prices were made to meet the equally low prices of competitors should be reviewed by this Court, for it concerns the conduct of a very important administrative agency and sanctions a

deprivation to petitioner of a full and fair opportunity to meet the Commission's charges.

The specific questions excluded by the examiner were preliminary questions to a competitor as to whether he solicited the business of the eight customers cited by the Commission in its findings (R. 297-299). Having been thwarted at the very inception of this line of questioning, no opportunity was afforded petitioner of proving the prices quoted by its competitor and that these prices were as low as its own. Plainly this was the clear intention of petitioner's attorney. The offer of proof shows that the competitors were undercutting petitioner, for their prices would have to be lower in order for them to solicit its customers "at prices they knew they could get it for." (R. 295.)

Since the statute imposes upon the accused merchant the burden of proving affirmatively that its lower price was fixed to meet the equally low price of a competitor, it is of the utmost importance that the Commission should place no obstacles in the path of the merchant seeking to overcome this burden and to prove his defense. Administrative law is not a one way street permitting to the agency the widest latitude in the submission of its evidence, yet at the same time compelling the case to be tried with "strictness" insofar as the accused's proof is concerned. The lower court, although it sharply criticized the Commission for its undue "strictness" and pointed "out the danger of conducting such a proceeding in such a spirit" nevertheless did not reverse the order nor remand the case for additional testimony. Its argument that "In the case at bar, it chances that no injustice was done," is illogical and unsound since the court is merely hazarding a guess as to the nature of the evidence that could have been developed had the trial examiner permitted the questions to be answered. The offer of proof and the questions demonstrated that the required

evidence would have been elicited had the Trial Examiner permitted the line of questioning.

This court should, in the interest of the proper conduct of all administrative agencies, review and reverse the lower court's refusal to consider the Commission's trial examiner's exclusion of relevant and vital testimony as depriving the petitioner of a full, fair and impartial hearing which the statute provides and the United States Constitution guarantees.

6. Finally, this case presents the question of whether Section 2 (a) of the Robinson-Patman Act as interpreted by the Circuit Court of Appeals, is not in violation of the commerce clause (Article 1, Section 8) and of the due process clause (5th Amendment) of the Constitution. This Court should decide whether, in the absence of a requirement of proof of an unreasonable restraint of trade either by a substantial lessening of competition or a tendency to monopoly, a statute can validly force a seller to sell to his customers at the same prices, or force him only to meet his competitor's price and not attempt to beat it or make him continue to observe the first price he fixes for his merchandise, or force him to find out his competitor's price before fixing his own price.

Conclusion

It is respectfully submitted that the petition for a writ of certiorari should be granted.

HENRY WARD BEER,
Attorney for Petitioner,
Samuel H. Moss, Inc.

Dated: New York City, July —, 1945.